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THE U.S. CATHOLIC BISHOPS AND GAY CIVIL RIGHTS:

FOUR CASE STUDIES*

ROBERT NUGENT**

More than five years have now passed since the Vatican's Congregation for the Doctrine of the Faith (CDF) sent a document to the U.S. Catholic Bishops with the unwieldy title, *Some Considerations Concerning the Response to Legislative Proposals on the Non-Discrimination of Homosexual Persons*.¹

The purpose of the document was to help U.S. bishops apply certain principles, which had been spelled out by the Congregation in a 1986 letter² on the pastoral care of homosexual persons,

* This article had its origins in a lecture presented by the author at the John Jay Marshall Law School Interdisciplinary Conference, Tenth Anniversary of *Bowers v. Hardwick*, Mar. 14-16, 1996.

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¹ *Some Considerations Concerning the Response to Legislative Proposals on the Non-Discrimination of Homosexual Persons* (July 23, 1992) [hereinafter *Considerations*]. The complete text can be found in *VOICES OF HOPE: A COLLECTION OF POSITIVE CATHOLIC WRITINGS ON GAY AND LESBIAN ISSUES* 229-33 (Jeannine Gramick & Robert Nugent eds., 1995). *Considerations* is also available on the Internet at <<http://www.rc.net/rcchurch/vatstmts/bishops.gay>>.

² *The Congregation for the Doctrine of the Faith's Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons* (Nov. 13, 1986) (cited in *ORIGINS* 16, at 379-82) [hereinafter *Letter to Bishops*].

to potential gay rights legislation.³

Reactions by the U.S. bishops to the 1992 document ranged from enthusiastic praise to outright rejection. While most bishops said little or nothing publicly about the Congregation's latest attempt to clarify the Church's concerns, some noted its status as an unsigned document, while others downplayed its importance by placing its contents within the context of current U.S. policies and practices.⁴

Archbishop Daniel Pilarczyk of Cincinnati, then-president of the National Conference of Catholic Bishops, spoke on behalf of the U.S. bishops and tactfully noted that the U.S. bishops would evaluate local gay rights legislation with the Vatican considerations in mind.⁵ Archbishop Pilarczyk, who has exhibited concern over the protection of homosexuals from discriminatory practices, stated that the bishops would continue to look for ways "in which those people who have a homosexual orientation will not suffer unjust discrimination in law or reality because of their orientation."⁶ Nevertheless, while condemning arbitrary discrimination and prejudice, Archbishop Pilarczyk acknowledged that the archdiocese would find legislation which supported or approved gay behavior or a homosexual lifestyle to be unaccept-

³ The Vatican recognized that it would be impossible to address all proposed legislation on sexual orientation-based discrimination. Nevertheless, it offered its observations in an attempt to "identify some principles and distinctions of a general nature which should be taken into consideration by the conscientious Catholic legislator, voter, or Church authority who is confronted with such issues." *Considerations*, *supra* note 1, Foreword.

⁴ For example, Archbishop Thomas Kelly of Louisville endorsed the document (but permitted his priests to dissent from the document openly). See Martha Sawyer Allen, *Oceans Apart: Vatican's Stand on Bias Against Gays Continues to Irritate Many U.S. Catholics*, STAR TRIB. (Minneapolis, MN), Aug. 23, 1992, at 1A, available in LEXIS, News Library, Arcnws File. Archbishop John Roach of the Archdiocese of St. Paul and Minneapolis minimized the statement's importance and argued to uphold the dignity of all people equally, *see id.*, while Bishop Thomas Gumbleton of Detroit rejected the document outright and urged that it not be implemented, *see* Press Statement, July 28, 1992, in VOICES OF HOPE, *supra* note 1, at 187-88. For a sampling of reactions to the 1992 document see VOICES OF HOPE, *supra* note 1, at 178-227.

⁵ See Kathryn Rogers, *Gay Catholic at Odds with Vatican Leader of Homosexual Rights Group*, ST. LOUIS POST-DISPATCH, Aug. 15, 1992, at 6D, available in 1992 WL 3549137.

⁶ Press Statement, July 22, 1992, in VOICES OF HOPE, *supra* note 1, at 184; *see also* Rogers, *supra* note 5, at 6D. In 1993, Archbishop Pilarczyk had unsuccessfully urged Cincinnati Catholics to vote against Issue 3, a city charter amendment that would have prohibited anti-discrimination protection for gay and lesbian citizens. *See id.*

able.⁷

Prior to 1992, Catholic bishops throughout the U.S. had already taken a variety of public stances in response to local legislation concerning homosexuality which may have conflicted with the new statement. Shortly after the 1992 statement became public, Joaquin Navaro-Valls, a Vatican spokesperson, asserted that the Vatican did not intend to pass judgment on previous responses by local bishops or state conferences of bishops to legislative proposals.⁸ Navaro-Valls seemingly minimized the authority of the document by classifying it as a “background resource” offering discreet assistance to bishops faced with the task of evaluating gay rights legislation, rather than an “official and public” instruction on the matter.⁹

It is instructive to examine the practical responses of U.S. Catholic bishops to proposed gay rights legislation in light of the 1992 document. Such a study suggests that the U.S. bishops have not made significant public use of the Vatican’s 1992 statement. Many bishops continue to chart their own careful course of promoting and defending the rights of gays and lesbians while simultaneously articulating Catholic teachings on human sexuality, marriage and family and their relationship to a pluralistic society and culture. Emphasizing the distinction between homosexuality as orientation or identity and homosexuality as human sexual behavior has enabled the U.S. bishops to follow their own path, despite the resulting pastoral tensions and inconsistencies in their positions.¹⁰

The Vatican has also long recognized the validity of this distinction and alludes to it frequently in its pronouncements on homosexuality.¹¹ The gay rights implications it draws from the distinction, however, differ significantly from the positions of the U.S. bishops detailed in the four instances discussed below.

There are at least four different positions that various bish-

⁷ See Beth Menge, *Catholic Gays Begin to Seek Acceptance*, CIN. ENQUIRER, Nov. 16, 1992, at A9, available in 1992 WL 4031428.

⁸ See Rogers, *supra* note 5, at 6D.

⁹ *Id.*

¹⁰ The Catholic Church first recognized this distinction in *Declaration on Certain Questions Concerning Sexual Ethics*, in ORIGINS 5 (1976).

¹¹ See *Considerations*, *supra* note 1, ¶ 1 (citing *Letter to Bishops*, *supra* note 2, and noting distinction between “the homosexual condition or tendency and individual homosexual actions, the latter which are intrinsically disordered and in no case to be approved of”) (internal quotations omitted).

ops have taken in response to gay rights proposals since 1992. Each of these stances will be discussed in this article. Though the episcopal response more directly reflected the 1992 document in some cases than in others, its effects can be seen explicitly or implicitly in all four. The four positions which U.S. bishops have taken toward gay rights legislation can be classified as: (1) opposition, (2) neutrality, (3) cooperative opposition, and (4) non-cooperative opposition.

I. OPPOSITION: LOUISVILLE, KENTUCKY

The Archdiocese of Louisville, Kentucky was the first to utilize the 1992 Vatican advice on gay rights. One month after the release of the official version of the 1992 document, Archbishop Thomas Kelly wrote a letter to Melissa Mershon, President of the Louisville Board of Aldermen.¹² In his letter, Kelly voiced opposition to the proposed Fairness Amendment in Louisville. The gay rights ordinance would have changed city law to protect gay and lesbian citizens from discrimination in housing, employment and public accommodations based on their sexual orientation.¹³ Kelly opposed the bill to clarify the Catholic Church's position on this issue of great community debate.¹⁴ Kelly referred to the 1992 Vatican statement and echoed it, asserting that in the view of the Church, "there may be legitimate reasons why employers, landlords and others ... might choose to deny someone housing, employment or other activities on the basis of the applicant's sexual orientation."¹⁵

The Vatican statement explicitly stated that it is not unjust to discriminate on account of sexual orientation in certain areas,

¹² See *Kelly Clarifies Letter Opposing Gay-Rights Law*, COURIER-JOURNAL, (Louisville, Ky.), July 31 1992, at 5B, available in LEXIS, News Library, Arcnws file; see also Mary O'Doherty, *Archbishop Announces Opposition to Gay-Rights Law*, COURIER-JOURNAL, July 25, 1992, at 1A, available in LEXIS, News Library, Arcnws File (discussing reactions to the letter). Although Kelly was "publicly silent last winter when the aldermen first considered the gay-rights proposal," he urged the defeat of the proposal after the Vatican issued its statement. Leslie Scanlon, *Catholic Group Renews Support for Gay Rights*, COURIER-JOURNAL, Aug. 5, 1992, at 1B, available in LEXIS, News Library, Arcnws File.

¹³ See Bill Wolfe & Mary O'Doherty, *Kelly's Stance on Gay Rights Surprises Catholic Groups*, COURIER-JOURNAL, July 29, 1992, at 1B, available in LEXIS, News Library, Arcnws File.

¹⁴ See *id.*

¹⁵ *Archbishop Kelly Explains Church's Position*, THE RECORD, July 23, 1992, at 1.

which include adoption and foster care, the employment of teachers and athletic coaches and military recruitment. The 1992 statement noted that while homosexual persons have the right to employment and housing, these rights are not absolute. Though aware of the potential of being misunderstood,¹⁶ Kelly aligned his position with the Vatican's and stated that the Church opposes laws making it illegal for responsible persons to exercise discretion in hiring policies and housing based on sexual orientation.¹⁷

Kelly's Archdiocesan Justice and Peace Commission and several parishes had publicly endorsed the bill before being caught off guard by Kelly's opposition. Father Joseph Vest, a highly respected pastor in the Archdiocese, stated in public testimony on behalf of the bill that "I stand before you as a Roman Catholic priest saddened that the Gospel of Jesus has been used to divide our community over this issue And I stand before you as a gay man who is plain tired of having my rights denied."¹⁸ Although there were no immediate repercussions from the Church,¹⁹ Father Vest eventually left the archdiocese after being told that there were no available assignments for him.²⁰

In August of 1992, one day after the Louisville Board of Aldermen defeated the proposed legislation, Archbishop Kelly made a community-wide appeal for "healing and reconciliation."²¹

In 1995, a similar piece of legislation on gay rights was again introduced into the Louisville city council. This time the

¹⁶ See *Kelly Clarifies Letter Opposing Gay-Rights Law*, *supra* note 12, at 5B.

¹⁷ Kelly's letter continued,

For this reason, while the Church affirms the fact that homosexual persons, as persons, have the same rights as all persons ... [T]he Church also opposes any legislation which would make it illegal for responsible persons to exercise discretion in housing, employment and other matters of genuine social concern on the basis of sexual orientation.

O'Doherty, *supra* note 12, at 1A.

¹⁸ Mary O'Doherty, *Priest Announces He's Gay, Urges Vote for Rights Law*, *COURIER-JOURNAL*, July 29, 1992, at 1A, available in LEXIS, News Library, Arcnws File.

¹⁹ In response to Father Vest's public announcement, the archdiocese issued a statement that the disclosure would not affect his professional standing. *Id.* But see Bill Wolfe, *Parish Expected to Back Priest Despite Surprise*, *COURIER-JOURNAL*, July 30, 1992, at 1A, available in LEXIS, News Library, Arcnws File (quoting a nun who indicated Father Vest could have a legitimate concern about his professional risk due to the disclosure).

²⁰ Father Vest has since returned to Louisville.

²¹ Scanlon, *supra* note 12, at B1.

Archbishop released a statement which stopped just short of opposition to the revised proposed ordinance. Kelly instead urged the Board of Aldermen to consider carefully the evidence brought forward at public hearings and noted that the Fairness Amendment, which he had opposed in 1992, was much broader and more complex in nature than the new one in 1995.²² While the 1992 bill would have banned discrimination in employment, housing and public accommodations, the 1995 bill only protected people in the area of employment. The Archbishop did not indicate why he felt that anti-discrimination legislation covering employment only was more acceptable than legislation covering other areas. Despite Kelly's more neutral position that the 1995 bill was at least worth considering, the proposed legislation was defeated by the city council in March, 1995.²³

II. NEUTRALITY: WASHINGTON STATE

The State of Washington is comprised of the Archdiocese of Seattle and the dioceses of Spokane and Yakima. In the spring of 1994, the state's Catholic bishops, the now-deceased Archbishop Thomas J. Murphy of Seattle and Bishops William S. Skylstad of Spokane and Francis E. George, OMI, of Yakima, were faced with two proposed ballot questions, 608 and 610.²⁴ Ballot question 608 prohibited government from according rights based on sexual orientation and would have banned schools from presenting homosexuality as acceptable.²⁵ Ballot question 610

²² See Leslie Scanlon, *Religions Pulling in Gay-Rights Tug of War*, COURIER-JOURNAL, Mar. 23, 1995, at 1A, available in LEXIS, News Library, Arcnws File.

²³ See *id.*; see also Leslie Scanlon, *Decision Has No Quick Impact on Kentucky*, COURIER-JOURNAL, May 21, 1996, at 4A, available in LEXIS, News Library, Curnws File.

²⁴ See Jane Hadley, *Archbishop Issues Memo Concerning Gay-Rights Issues*, SEATTLE POST-INTELLIGENCER, Feb. 9, 1994, at B5, available in 1994 WL 6140692. It is the practice in Washington state, on statewide issues, for the three bishops to issue a joint statement. See *id.* Archbishop Murphy was perceived by opponents and supporters of the bill as taking a strong stance when he asked local parishes not to allow supporters of two anti-gay-rights initiatives to gather signatures on Church property. See *id.*; see also Linda V. Mapes, *Church Takes Stand Against Gay Initiative: Catholics Won't Allow Gathering of Signatures*, SPOKESMAN REV. (Spokane, Wash.), Feb. 9, 1994, at B1, available in 1994 WL 4509369 [hereinafter *Church Takes Stand*]; Mark O'Keefe, *Bishops Clear on Gay-Rights Issue*, PORTLAND OREGONIAN, Oct. 20, 1994, at D4, available in 1994 WL 4850243 (comparing the denouncement of Washington's initiatives with reactions to a similar anti-gay rights initiative in Oregon).

²⁵ See *Initiative Would Ban Gay Teachings in College*, SEATTLE TIMES, Jan. 28,

would have banned rights based on homosexuality, and prohibited gay and lesbian parents from gaining custody of other children or gaining custody of their own children in divorce cases.²⁶ Ballot question 610 would have also banned government approval of homosexuality.²⁷ According to the bishops, the initiatives as written "could foster discrimination against homosexuals," and were therefore "morally wrong" from a Catholic perspective.²⁸ In a statement from the Washington State Catholic Conference (WSCC), which is the policy arm of the three bishops, the bishops asked Catholics and all people of good will to join with them in opposing the initiatives, which were eventually defeated.²⁹

In a separate letter, Archbishop Murphy explained the bishops' position to Catholics by stating that the proposed measures "contradict the inherent dignity of human persons by discriminating against them for who they are."³⁰ He was alluding to the failure of the measures to carefully distinguish between homosexual behavior and homosexual orientation. Archbishop Murphy distinguished the initiatives from the gay rights bill which the WSCC had previously opposed by arguing that the bill promoted public policy contrary to Church teaching on sexuality. He was referring to language in the bill that would have made homosexuality, heterosexuality and bisexuality legally equiva-

1994, at B3 (describing initiatives 608 and 610).

²⁶ See *id.*

²⁷ See *id.*; see also *Philadelphia II v. Gregorie*, 128 Wash. 707, 716 (1996) (refusing to block initiatives 608 and 610 from voter consideration), *cert. denied*, 117 S. Ct. 167.

²⁸ News Release, *Catholic Bishops Oppose Anti-Homosexual Initiatives*, Public Affairs Office, Catholic Archdiocese of Seattle, April 28, 1994.

²⁹ See *Bishops Oppose Moves to Restrict Homosexual's Rights in Washington*, CATH. MESSENGER, May 12, 1994, at 1 [hereinafter *Bishops Oppose Moves*]; see also *Churches Come Down on Both Sides of the Issue*, NEWS TRIB. (Tacoma, Wash.), Apr. 29, 1994, at N7, available in 1994 WL 4628804.

³⁰ *Bishops Oppose Moves*, *supra* note 29. The gay rights bill (HB 1443) would mirror Washington's civil rights statutes by adding homosexuals and bisexuals to the list of protected classes. See Jim Simon, *Bishops Fight Bill Protecting Gay Rights—Catholic Church Enters Close Battle in State Senate*, SEATTLE TIMES, Feb. 22, 1994, at A1. An opposition letter sent by the Catholic Conference to state senators opposing the bill stated that "this effort is not only about discrimination, but about societal acceptance and public endorsement of homosexuality. We cannot lend support to that effort." *Id.* (quoting Edward Dolejsi, director of the Catholic Conference). The letter was sent privately because the Church did not want to speak out publicly on the bill. See *id.* The letter also reflects the Church's dilemma over standing up for oppressed groups while forbidding homosexuality. See *id.*

lent for purposes of civil rights protection.³¹

Murphy's explanation of the bishops' opposition to the two 1994 initiatives (608 and 610) was quoted directly from the 1992 Vatican document which deplored "violent malice in speech or action" against homosexual people and called on the Church's pastors to condemn it "wherever it occurs."³²

In 1995 the Washington state bishops were again confronted with two similar initiatives relating to homosexuality.³³ The first, initiative 166, asked voters whether government should be "prohibited from according rights or protections based on sexual orientation, and schools from presenting homosexuality as acceptable."³⁴ The second, initiative 167, asked whether government should "be prohibited from placing children for adoption or foster care with any homosexual or with cohabiting unmarried persons."³⁵

As previously noted, the 1992 Vatican instruction explicitly mentioned "the consignment of children to adoption or foster care" as one area where discrimination based on sexual orientation and behavior would be just.³⁶ Likewise, the Vatican argued specifically that sexual orientation does not constitute a classification comparable to race, sex or ethnic background, and, therefore, cannot be the basis for legal protection.³⁷ For these reasons, the WSCC decided to maintain a position of neutrality on initia-

³¹ See Francis E. George, Editorial, *State's Gay Rights Proposal Bad Law with Good Intent*, SEATTLE POST-INTELLIGENCER, Mar. 16, 1994, at A11, available in 1994 WL 6134747. Francis E. George, Bishop of the Diocese of Yakima, stated that "HB 1443 spoke not of the equality of individuals before the law but of the equivalency, in law, of heterosexuality, homosexuality and bisexuality. The law shouldn't make such a judgment." *Id.*

³² *Considerations*, *supra* note 1, ¶ 7.

³³ The bishops' position on these initiatives—initiatives 166 and 167—was set forth in a memorandum published by the Washington State Catholic Conference Committee entitled *Church Teaching on Human Dignity and Sexuality and its Impact on Legislative Initiatives*, dated September 7, 1995 [hereinafter *Church Teaching*]. The memorandum was circulated to all pastoral leaders in the Archdiocese of Seattle and the dioceses of Spokane and Yakima and reprinted in its entirety in the diocesan newspaper, THE CATHOLIC NORTHWEST PROGRESS, Sept. 14, 1995, at 1.

³⁴ *Church Teaching*, *supra* note 33, at 3.

³⁵ *Id.*

³⁶ *Considerations*, *supra* note 1, ¶ 11; see also *Church Teaching*, *supra* note 33, at 4.

³⁷ See *Considerations*, *supra* note 1, ¶¶ 10, 14. For an analysis of this position, see Robert Nugent, *The Civil Rights of Homosexual People: Vatican Perspectives*, 7 NEW THEOLOGY REV. 4, 72-86 (Nov. 1994); *Homosexual Rights and the Catholic Community*, 44 DOCTRINE AND LIFE (Mar. 1994).

tives 166 and 167.³⁸

The WSCC refrained from endorsing initiative 166 because, although it would have eliminated the category of sexual orientation as a legal basis for anti-discrimination legislation, it failed to distinguish between orientation and behavior.³⁹ The bishops believed that supporting the initiative would cause people to “condemn homosexuals as well as their sexual activity,” a position contrary to Catholic teaching.⁴⁰ The tension between the bishops’ position that a person’s sexual orientation *can* serve as a valid basis for legal protection and the Vatican’s explicit denial of that assertion became apparent. The Vatican reasoned that homosexual orientation, in the philosophical realm, is an “objective disorder” and therefore cannot be validly compared with race, gender or even ethnic background as a legitimate basis for anti-discrimination laws.⁴¹ This claim has been challenged by Catholic analysts in the U.S. and elsewhere.⁴²

Also unacceptable to the Washington bishops was the possibility that their opposition to the initiative might give the appearance of condoning homosexual conduct which violates Catholic teaching.⁴³ The underpinning for most official Catholic opposition to gay rights legislation is a fear that public support or endorsement of particular laws or ordinances may be misinterpreted by Catholics or others as a change in the Church’s con-

³⁸ See *Church Teaching*, *supra* note 33, at 4.

³⁹ See *id.* at 3.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See Simon, *supra* note 30, at A1 (noting several Catholic clergy people and lay people supported the gay rights bill classifying homosexuals as a protected class). Indeed, in connection with his opposition to initiatives 608 and 610, John McCoy, spokesperson for the WSCC, had stated his belief that homosexuality is “either God-given, or developed very early in life, and therefore an innate characteristic, like race or gender.” *Church Takes Stand*, *supra* note 24, at B1 (internal quotations omitted).

⁴³ See *Church Teaching*, *supra* note 33, at 6; see also Gil Bailey, *Bishops Neutral on Anti-Gay Moves*, SEATTLE POST-INTELLIGENCER, Sept. 15, 1995, at B11, available in 1995 WL 4323258 (discussing a paper written by the three Catholic bishops and describing it as walking a thin line between supporting the Catholic doctrine on homosexual behavior and compassion for humanity). The bishops noted that “[i]nitiative 166 ... is similar to an initiative we opposed last year, but the debate that ensued caused confusion and misunderstanding about our teaching and the reason for our position.” *Id.* (quoting *Church Teaching*, *supra* note 33, at 3); see also *The Area Briefly—Seattle: Catholic Leaders Review Anti-Gay Initiatives*, NEWS TRIB. (Tacoma, Wash.), Sept. 16, 1995, at B2, available in 1995 WL 5373770.

demnation of homogenital acts.⁴⁴ Seeking a balance between upholding Church teachings on human sexuality and teachings on fundamental respect for the dignity of individuals, the bishops agreed that schools ought not "present homosexual behavior as acceptable," but nor should they "condemn homosexual persons for who they are."⁴⁵

Other concerns, such as the quality of family life, the stability of marriage and the fear of equating homosexuality with heterosexuality (especially in educational settings), are also discussed. As the initiatives pertain to these concerns, the bishops adhered to the 1992 Vatican statement which had explicitly stated that when examining gay rights laws, Church leaders need to be concerned about their responsibility to defend and promote family life.⁴⁶

The tension between concretely implementing the orientation-behavior distinction in particular gay rights legislation and the fear of sending misleading signals about the Church's position about homosexual behavior can be seen in the ambivalence of the Washington bishops toward the proposed initiatives. On the one hand, they feared being seen as favorable to homogenital acts if they opposed the initiative, yet they also feared being seen as violating the dignity of gay and lesbian people if they supported the initiative eliminating homosexual orientation as a basis for protection.⁴⁷

The bishops also feared that opposing legislation which restricted child care, foster parenting or adoption to heterosexuals might signal a change in Church teaching on family life and values, marriage and homosexual orientation.⁴⁸ While the bishops realized that they must protect "the ideal of children experiencing love and growth in the traditional family," they also acknowledged the realistic situation of so many children in need of

⁴⁴ See *Considerations*, *supra* note 1, ¶ 2 (warning against allowing people to "believe that the living out of this orientation in homosexual activity is a morally acceptable option. It is not."), and ¶¶ 5, 14 (warning priests not to give the impression that homosexuality is "completely harmless").

⁴⁵ *Church Teaching*, *supra* note 33, at 3.

⁴⁶ See *Considerations*, *supra* note 1, ¶¶ 6, 9, 15, 16.

⁴⁷ See Letter from Thomas J. Murphy, Archbishop of Seattle, to Pastors and Pastoral Life Directors of the Archdiocese of Seattle (Sept. 7, 1995) (on file with THE CATHOLIC LAWYER).

⁴⁸ See *Church Teaching*, *supra* note 33, at 4.

loving homes.⁴⁹ The bishops were troubled that the initiative might make it more difficult and time-consuming to place children in good homes.⁵⁰

The lack of a clear definition of homosexuality in the initiatives was also a problem for the bishops. The wording did not "appear to distinguish between 'those who practice homosexuality and those who acknowledge' a sexual desire for a person of the same gender."⁵¹

In officially advising Catholics as to how the bishops had evaluated these two measures, Archbishop Murphy wrote a letter to Pastors and Pastoral Life Directors of the Archdiocese of Seattle stating that the bishops had decided neither to endorse nor to oppose these initiatives.⁵²

Another possible reason why the bishops could neither oppose nor support the initiatives was that they found them to be "inadequately crafted," and believed both "could benefit from civil, responsible dialogue and amendment."⁵³ The bishops' call for further discussion and possible amendment was a key element in their response, and one which distinguished it from the opposition⁵⁴ and non-cooperative opposition⁵⁵ views. This approach, especially when it involves gay rights activists, Church representatives and legislators, is the logical and most effective measure in resolving many of the conflicts that arise when gay rights legislation appears to clash with Catholic principles. Not all bishops, however, are willing to engage in this kind of process.⁵⁶

The bishops of Washington State attempted to summarize relevant Church teachings and fundamental Catholic principles,

⁴⁹ *Id.*

⁵⁰ *See id.*

⁵¹ *Id.* (citation omitted).

⁵² *See* Letter from Thomas J. Murphy, Archbishop of Seattle, to Pastors and Pastoral Life Directors of the Archdiocese of Seattle, *supra* note 47. The Archbishop notes that the decision to remain neutral was "the result of prayer, discussion and discernment" among the bishops and their advisors. *Id.*

⁵³ *Church Teaching*, *supra* note 33, at 3. Amendments, however, were not possible at that stage of the legislative process. *See id.*

⁵⁴ *See supra* notes 12-23 and accompanying text (discussing opposition viewpoint).

⁵⁵ *See infra* notes 89-115 and accompanying text (discussing non-cooperative opposition viewpoint).

⁵⁶ Compare this with the position taken by the bishops in Maryland. *See supra* note 55.

which needed to be considered when analyzing gay rights legislation. With refreshing candor, they acknowledged that "people of good will may disagree with the application of these principles."⁵⁷

It is significant to note that the bishops of Washington strongly adhered to one of the points made by the Vatican instruction. The Vatican advised that in individual situations it is the bishop who must evaluate draft legislation and make judgments in local situations to determine whether or not particular gay rights legislation is advantageous to local Church institutions.⁵⁸

What was striking, however, was the Washington bishops' willingness to extend that same right to Catholic voters as well. The bishops were content simply to urge Catholics to use their consciences and best judgment in deciding whether to support the initiatives.⁵⁹ The bishops challenged Catholic voters to discern the human impact of policy decisions, moral implications and the social consequences of the choices they made and did not recommend a vote either way.⁶⁰

At first glance, the Washington bishops' "neutral" position appeared to disregard the explicit Vatican warning that it is inappropriate for Church authorities to remain neutral toward legislation adverse to Church interests.⁶¹ It seems the bishops did not necessarily view these initiatives as adverse to Catholic principles, or at least not adverse to the degree that, if defeated or passed, would have warranted full-scale support or rejection by the Church. Thus, they were left free to either support or oppose the two measures without being accused of violating the Vatican's directive.

In reality, this position is in full accord with the Vatican's 1992 instruction which leaves the individual bishops with the task of evaluating draft legislation regarding non-discrimination

⁵⁷ *Church Teaching*, *supra* note 33, at 4.

⁵⁸ *See Considerations*, *supra* note 1, ¶ 16.

⁵⁹ *See Church Teaching*, *supra* note 33, at 4.

⁶⁰ *See id.* (stating that evaluating initiatives is a complex task and understanding issues is relevant).

⁶¹ *Considerations*, *supra* note 1, ¶ 16 ("[S]ince a matter of the common good is concerned, it is inappropriate for Church authorities to endorse or remain neutral toward adverse legislation even if it grants exceptions to Church organizations and institutions.").

based on sexual orientation.⁶² After clarifying basic Catholic teaching and principles, the Washington bishops were willing to share this responsibility and discernment process with Catholics and recognize that in good conscience, Catholics can arrive at different conclusions on the proposed legislation and vote with their own consciences.

III. COOPERATIVE OPPOSITION: MAINE⁶³

The 1992 Vatican advice to bishops was injected into a gay rights controversy in Maine in the fall of 1995, not by the Church officials, but by supporters of Question 1, a referendum designed to deny civil rights to gay and lesbian citizens.⁶⁴ Catholic supporters of Question 1 in Maine circulated excerpts from the 1992 Vatican statement alleging that the Holy See had mandated Catholic support for the anti-gay measure.⁶⁵

Question 1 sought to limit human rights protection to those categories already set forth in the Maine Human Rights Act.⁶⁶ While the issue of gay civil rights was not explicit in the language of the referendum, if passed, Question 1 would not only have repealed the already existing Portland gay rights ordinance about which the diocese of Portland had remained ambivalent, but would also have repealed hate crime legislation which the Catholic Church had always supported.⁶⁷

⁶² *Considerations*, *supra* note 1, Foreword ("[T]hese observations will try to identify some principles and distinctions of a general nature which should be taken into consideration by the conscientious Catholic legislator, voter, or Church authority who is confronted with such issues.").

⁶³ In this third case it should be noted that while the Church's opposition actually refers to a proposed anti-gay ordinance rather than to a gay rights law, the Bishop of Maine urged cooperation in crafting legislation that would address the concerns of all citizens affected by the legislation.

⁶⁴ See Roxanne Moore Saucier, *Religious Groups Split on Question 1*, BANGOR DAILY NEWS, Nov. 3, 1995, available in 1995 WL 10898148.

⁶⁵ See *id.* A group known as All Catholics for Truth (ACT) circulated the 1992 Vatican document in connection with its organized effort to support the anti-gay rights legislation. Further, it claimed that the position of the diocese and its Bishop conflicted with the Pope's directives on affording special status to gays and lesbians. See *id.*

⁶⁶ See *id.* The Maine Human Rights Act was amended in 1997 to include gays and lesbians, and now prohibits discrimination on the basis of "race, color, sex, sexual orientation, physical or mental disability, religion, ancestry or national origin." ME. REV. STAT. ANN. tit. 5, § 4552 (West, WESTLAW through 1997 1st Spec. Sess.).

⁶⁷ See Fr. Michael J. Henchal, *Diocesan Position on Question #1*, CHURCH WORLD (Portland, Me.), Oct. 19, 1995, at 3. In particular, section 419 of the Hate Crime Statistics Act would have been nullified. On May 1, 1989, John L. Carr, Sec-

In the fall of 1995, the Chancellor of the Portland diocese, Father Michael J. Henchal, published a lengthy article in the diocesan paper which attempted to clarify the Church's position that the referendum was in basic conflict with Catholic principles of justice.⁶⁸

Central to the diocese's stance was the previously mentioned distinction between orientation and behavior.⁶⁹ Henchal noted that the diocese found the use of the term "orientation" ambiguous because it was not always clear whether the protection extended not only to orientation but to behavior as well.⁷⁰ Prior recommendations of the diocese to clarify this distinction in the language of the bill had not been adopted by the legislature. Thus, the Church in Maine remained reluctant and anxious about such proposals, and, in some sense, still opposed.

In opposition to the acceptance of Question 1, Father Henchal noted that even a law which "perfectly reflected Catholic moral teaching in homosexuality could be overturned by the proposed initiative."⁷¹ The diocese suggested that legislation could be crafted which would protect homosexuals against unjust discrimination and at the same time address the concerns of opponents who might be troubled by a supposed "homosexual agenda."⁷² The diocese indicated its willingness to participate in such an effort which, it acknowledged, would not be easy.⁷³ In

retary of the U. S. Bishops Department of Social Development and World Peace, wrote on behalf of the U.S. bishops to Senator Paul Simon in general support of the Hate Crime Statistics Act (S. 419). See VOICES OF HOPE, *supra* note 1, at 235; see also Editorial, *Maine a Better Place Without Question #1*, PORTLAND PRESS HERALD/MAINE SUNDAY TELEGRAM (Nov. 9, 1995), <<http://qrd.tcp.com/qrd/www/usa/maine/pph-11.9.95-edit.html>> (noting that Question 1 would have repealed sections relating to gays in the Maine Human Rights Act and the University of Maine system's anti-discrimination policy).

⁶⁸ See Henchal, *supra* note 67, at 3.

⁶⁹ See *supra* notes 10-11 and accompanying text (discussing distinction between homosexual orientation and behavior).

⁷⁰ See Henchal, *supra* note 67, at 3 ("The position of the Roman Catholic Church on homosexuality is characterized by a distinction which is often ignored or overlooked between homosexual orientation and homosexual behavior. ... [T]he current referendum ... fails to make any distinctions."). *Id.* Father Henchal further noted that Catholics cannot endorse legislation that permits discrimination on the basis of orientation alone. See *id.*

⁷¹ *Id.* (comparing referendum to "a nuclear bomb where a scalpel is what is needed"). Father Henchal further stated that also in danger would be other categories such as workers' compensation victims, veterans, health care providers, even smokers who might be adversely affected in the future by this legislation. See *id.*

⁷² *Id.*

⁷³ See *id.*

examining the diocese's idea of an ideal bill acceptable to the vast majority of voters, it becomes clear how difficult it would be to construct such legislation.

On the one hand, such ideal legislation, according to the viewpoint of the Church, would "prohibit discrimination in the workplace, in housing, credit and public accommodation in all circumstances where a person's sexual orientation or *even behavior* cannot reasonably be regarded as relevant."⁷⁴ Such legislation, for instance, would protect homosexuals from violence or being terminated from their jobs for reporting assault, and would allow hate crime legislation to apply in such cases.

On the other hand, the ideal legislation could not require that employers grant the same benefits to same-sex couples as to married couples; nor could it force adoption agencies to allow a homosexual person or couple to adopt a child under any circumstances. It is clear that the question of who determines when sexual orientation or behavior is reasonably relevant is crucial in any attempt to craft gay rights laws acceptable to the majority of citizens.

What is surprising in this approach is that the Maine diocese is willing to acknowledge situations when even homosexual *behavior* might not be considered as a reasonably relevant factor in discriminating against homosexual individuals. This position appears to conflict directly with the Vatican's position that some rights of homosexual people can be legitimately curtailed whenever homosexual behavior is at issue.⁷⁵

On October 26, 1995, Father Henchal again attempted to clarify the diocese's position in response to those who claimed that the Bishop's position both conflicted with the Vatican's teaching about not conferring special status on homosexuals and contravened Church teachings on fundamental issues of doctrine, ethics and morality.⁷⁶

In defense, Father Henchal pointed out that the Vatican itself acknowledged that it was impossible to anticipate every eventuality and, therefore, the Bishop's less than absolute posi-

⁷⁴ *Id.* (emphasis added).

⁷⁵ See *Considerations*, *supra* note 1, ¶ 12 (stating that certain rights are not absolute and "can be legitimately limited for objectively disordered external conduct").

⁷⁶ See Michael J. Henchal, *The Holy See Does Not Mandate Support of Question 1*, CHURCH WORLD (Portland, Me.), October 26, 1995, at 3 [hereinafter *Holy See*].

tion did not conflict with the Vatican's teachings.⁷⁷ Consequently, pronouncements on specific legislation were properly left to the local bishop.⁷⁸ Father Henchal also pointed out that other bishops in the country, including Archbishop McCarthy of Florida, Archbishop Stafford of Colorado and Archbishop Levada of Oregon—bishops whom Henchal characterized as not being “men with reputations of opposition to the Holy Father,” had opposed similar proposals.⁷⁹ Father Henchal concluded his argument with a rhetorical question designed to convince even the most orthodox conscience: “[I]s it likely that if the Holy See thought that Archbishop Levada was disloyal on homosexuality, would he have been recently appointed Archbishop of San Francisco?”⁸⁰ Thus it seems that the Maine diocese was firmly convinced that its position was “entirely consistent with the letter of the Congregation.”⁸¹

Although some Catholics in Maine were confused as to whether the Church had suddenly changed its position on homosexuality, they apparently were able to follow the distinctions being made by the Maine diocese.⁸² The anti-gay Maine referendum was defeated by a slight majority in November, 1995.⁸³

In 1997 two New England states, Maine and New Hampshire, adopted state-wide nondiscrimination protection for gay

⁷⁷ See *id.*

⁷⁸ See *id.*

⁷⁹ *Id.* In addition, three bishops, Walter Sullivan of Virginia, Thomas Gumbleton of Michigan, and Charles A. Buswell of Colorado, signed a joint statement critiquing the Vatican document supporting certain discrimination of homosexuals. See *Religion: Lutherans Condemn Racism, Affirm Quotas*, ST. PETERSBURG TIMES, Nov. 7, 1992, at 2E, available in 1992 WL 10997635.

⁸⁰ *Holy See, supra* note 76, at 3.

⁸¹ *Id.*

⁸² Confusion in the Church's position is due in part to the private interests on either side of the issue which attempt to garner greater justification for their position by interpreting Church statements in a beneficial light. See James Kales, *A Referendum in Maine Voting on Gay Rights*, COMMONWEAL, Jan. 28, 1994, at 7-8 (“An EPL leaflet, for example, under the heading ‘Catholic Church Supports Equal Rights for Everyone’ quoted the U.S. Catholic bishops’ 1976 statement that ‘homosexual persons, like everyone else, should not suffer from prejudice against their basic human rights.’”). *Id.*

⁸³ See A. Jay Higgins, *Civic League Ponders Gay Rights Issue: Petition Would Seek to Give Voters Veto Over Laws Pertaining to Homosexuals*, BANGOR DAILY NEWS, Jan. 23, 1996, available in 1996 WL 2184545; see also Kales, *supra* note 82, at 7 (discussing a 1993 ordinance to protect persons from discrimination defeated by referendum by a two-to-one margin).

and lesbian citizens with support from the Catholic Church.⁸⁴ Maine had been working on a bill for twenty years. The Catholic Church in Maine remained “neutral” on that state’s gay rights bill in part because the Governor had allowed a bill prohibiting same-sex marriage to pass into law without his signature.⁸⁵ Since the Church had strongly supported the anti-gay marriage legislation, the Church’s neutral position on the anti-discrimination bill was seen as a concession.⁸⁶ The CDF’s warning to bishops not to remain neutral about adverse gay rights legislation apparently did not affect the decision of the Bishop in Maine, who adjudged the particular piece of legislation not to be against the common good. But in failing to oppose legislation protecting individuals on the basis of their sexual orientation, the Bishop appeared to differ with the CDF on homosexual orientation as a basis for civil rights. According to local Maine activists, the fact that the Maine legislature listened to the Church on the significant moral issue of marriage made it easier for the Bishop to support a ban on anti-gay discrimination—an issue which lacked the moral connotation of marriage.⁸⁷

In New Hampshire, support for the state’s gay rights bill was bolstered by Bishop Leo O’Neil’s agreement to drop opposition in return for the insertion of language declaring that the state does not intend to promote or endorse any sexual lifestyle other than the traditional marriage-based family.⁸⁸

⁸⁴ See ME. REV. STAT. ANN. tit. 5, § 4552 (West, WESTLAW through 1997 1st Spec. Sess.) (effective upon failure of petition or referendum under people’s veto proceedings) (amending antidiscrimination law to include discrimination based on sexual orientation); Act of June 9, 1997, ch. 108, 1997 N.H. Laws (House Bill 421) (effective Jan. 1, 1998) (amending discrimination laws to prohibit discrimination on account of sexual orientation).

⁸⁵ See Steven G. Vegh, *Diocese Affirms Stand on Gay Law; Some Catholics Say a National Bishops’ Letter Justifies a Shift in Favor of Gay Rights in Maine*, PORTLAND PRESS HERALD, Oct. 3, 1997, at 1A, available in LEXIS, News Library, Curnws File (noting the diocese has remained neutral regarding a pending referendum to repeal the law); Paul Carrier, *Anti-Gay Referendum Options Exist*, KENNEBEC J., May 11, 1997, at 11, available in LEXIS, News Library, Curnws File. The same-sex marriage bill purports to encourage the traditional marriage-based family by prohibiting same-sex marriages and not recognizing the validity of such a marriage if performed in another state. ME. REV. STAT. ANN. 19-A, § 650 (West, WESTLAW through 1997, 1st Spec. Sess.).

⁸⁶ See Carrier, *supra* note 85, at 11.

⁸⁷ See *id.*

⁸⁸ See Donn Tibbetts, *Senate Panel Urges Passage of Gay Rights Bill*, UNION LEADER (Manchester, N.H.), Apr. 30, 1997, at A6, available in LEXIS, News Library, Curnws File (noting Bishop O’Neil’s satisfaction with amendments to the bill).

IV. NON-COOPERATIVE OPPOSITION: MARYLAND CATHOLIC CONFERENCE (MCC)⁸⁹

On February 15, 1995, the MCC Executive Director, Richard J. Dowling, sent a three-page letter to the chair of the Maryland House of Delegates Commerce and Government Matters Committee concerning House Bill 213, also known as the Anti-discrimination Act of 1995.⁹⁰

Bill 213 proposed to prohibit discrimination in housing, employment and public accommodations on the basis of sexual orientation.⁹¹ According to the Dowling letter, the main objection by bishops of the several dioceses was that the subsidiary legal definition of sexual orientation included identification of an individual as homosexual, bisexual, or heterosexual, or the practice of homosexuality, bisexuality or heterosexuality.⁹² The MCC argued that by including the term "practice" in the definition of sexual orientation, the proposed statute would nullify longstanding state laws proscribing sodomy and other aberrant acts.⁹³ At the time of its opposition, the MCC was aware that Maryland's Attorney General had publicly supported the bill and stated that nothing in the bill contradicted other state laws.⁹⁴

The MCC, like the bishops of Washington state, did not oppose legal protection for individuals on the basis of their sexual orientation or identification.⁹⁵ They argued, however, that if such protection was necessary, then individual legislation to address particular cases of discrimination should be crafted.⁹⁶

which clarified that the bill did not permit adoptions by homosexuals or same-sex marriages).

⁸⁹ The Maryland Catholic Conference (MCC) represents the bishops of Maryland, Washington, D.C., and Delaware. See Bill Broadway, *Faith and Assisted Suicide; In Oregon Vote, Even Euthanasia Foes Were Wary of Making a Religious Connection*, WASH. POST, Nov. 15, 1997, at B8.

⁹⁰ Letter from Richard J. Dowling, Executive Director of the Maryland Catholic Conference, to Delegate Gerald J. Curran, Chairman of the Commerce and Government Matters Committee of the Maryland House of Delegates (February 16, 1995) (on file with the author) [hereinafter Dowling Letter].

⁹¹ H.B. 213, 161st Leg., Reg. Sess. (Md. 1995); see also H.B. 431, 163d Leg., Reg. Sess. (Md. 1997) (proposing to prohibit discrimination on the basis of sexual orientation with regard to housing, employment and public accommodation).

⁹² See Dowling Letter, *supra* note 90.

⁹³ See *id.*

⁹⁴ For instance, Maryland proscribes sodomy as well as other unnatural or perverted sexual practices, and punishes such acts as crimes. See MD. ANN. CODE art. 27, § 554 (Michie, LEXIS through 1997 supplement).

⁹⁵ See *supra* text accompanying notes 30-31.

⁹⁶ See Dowling Letter, *supra* note 90.

The MCC believed that efforts to end discrimination against homosexuals by expanding the categories of civil rights was inappropriate. They felt that protection should instead be founded "in basic human rights inhering in the human person, not in a variety of behavior."⁹⁷

This position seems to have been directly influenced by the 1992 advice from Rome. According to the Vatican's logic, making it legal to prohibit discrimination on the basis of homosexual orientation could lead people to regard homosexuality itself as a positive source of human rights. The Vatican reasoned that if this happened, the exercise of rights would be defined precisely by the affirmation of the homosexual condition instead of in terms of a violation of basic human rights.⁹⁸

Despite this official stance, it cannot be denied that there is still a discrepancy between the position of the MCC and the Vatican instruction. Both are in agreement that legal protection cannot be afforded to homosexual behavior. The MCC, however, would permit protective legislation prohibiting discrimination based on homosexual orientation or identification, but not as a human right inhering in the individual, and only when the protection is applied under the appropriate circumstances. The Vatican, however, is unwilling to endorse any kind of legal protection based either on sexual behavior or orientation.⁹⁹

On March 13, 1995, Maryland lawmakers defeated the Anti-discrimination Act by a committee vote of 12 to 7.¹⁰⁰ It was the fourth consecutive year that the Maryland House of Delegates defeated a state's gay rights bill; and each decision was preceded by strong opposition from the Catholic Church.¹⁰¹ The bill's proponents, including Free State Justice, a coalition of gay and lesbian civil rights groups, had hoped that the support of the governor, attorney general, and chair of the Commerce and Government Matters Committee could overcome the MCC's op-

⁹⁷ *Id.*

⁹⁸ See *Considerations*, *supra* note 1, ¶ 2 ("Therefore special concern and pastoral attention should be directed toward those who have this condition, lest they be led to believe that the living out of this orientation in homosexual activity is a morally acceptable option. It is not."). *Id.*

⁹⁹ See *id.* ¶ 16.

¹⁰⁰ See John A. Morris, *Maryland House Panel Kills Gay-Rights Bill*, BALTIMORE SUN, Mar. 14, 1995, at 4B.

¹⁰¹ See *id.*

position.¹⁰² Dowling's letter proved persuasive, particularly because Dowling, as Executive Director of the MCC, not only represented the Archdiocese of Baltimore, but all the bishops of Maryland, and Delaware, as well. Although Dowling was well aware of the powerful effect that his letter had on behalf of the bishops, he only allowed himself partial credit by stating that the MCC statement had been characterized by some as having merely influenced the measure's outcome.

After the bill's defeat, the MCC revealed its larger strategy during its Board of Director's meeting at St. Mary's Seminary on May 24, 1995.¹⁰³ During a discussion of the bill and the MCC's official public stance, Bishop William Lori, the Assistant Bishop of Washington, D.C., said that the MCC took the right tack, and the incorporation of a natural law position was an especially strong argument.¹⁰⁴ Baltimore Auxiliary Bishop John H. Ricard, Chair of the United States Catholic Conference Committee on Domestic Policy, suggested that the MCC might benefit from aligning itself with the position of the legislative Black Caucus on the issue of expanding the protected categories of civil rights.¹⁰⁵

Dowling, however, revealed the group's underlying reluctance to cooperate in crafting a bill that would be agreeable to the MCC when he stated that the bill, in its present form, would pose problems for Church agencies, especially in the areas of

¹⁰² See *id.*

¹⁰³ This information is contained in a one-page excerpt from the minutes of the meeting of the Maryland Catholic Conference held in Baltimore on May 24, 1995, which is in the possession of the author.

¹⁰⁴ In a surprising break from traditional Catholic natural law theory, Supreme Court Justice Antonin Scalia, lecturing in Rome in May 1996, stated that "a government should not determine policies according to moral principles, unless those principles are shared by the majority." *Majority Rules on Abortion: Scalia*, CATH. MESSENGER, May 9, 1996, at 6. In 1995, Pope John Paul II stated that natural law was an obligatory point of reference for civil law. See Larry Witham, *Pope Says Moral Law Overrides Civil*, WASH. TIMES, Mar. 28, 1995, at A1 (announcing Pope John Paul II's encyclical, *Evangelium Vitae*, and stating that the Pope condemns civil laws, such as those allowing legalizing abortion and euthanasia, because they violate natural law sanctity of life).

¹⁰⁵ The Maryland Legislative Black Caucus includes Maryland's brightest and most talented legislators. The caucus has expanded programs to achieve a wide-ranging, proactive agenda. See Elijah E. Cummings, *The Maryland Black Caucus, No More Business as Usual*, BALTIMORE AFRO-AMERICAN, Apr. 12, 1997, at A5. The caucus has tackled health care, education, welfare reform, environmental protection, and other ground-breaking legislation for both urban and rural African-American interests in Maryland. See *id.*

employment and Church-run housing programs.¹⁰⁶ But he was confident, he said, that these matters could be resolved in a satisfactory manner. Indeed, significant changes would be necessary if the bill were to gain any momentum. Dowling also noted that the amendment of the bill by the MCC, in a form acceptable to the Catholic Church, could be viewed by legislators as a "green light" to the bill, thereby resulting in its passage in the state legislature.¹⁰⁷

Apparently unwilling to risk passage of the bill, Dowling suggested that a preferable strategy would be for the MCC to continue opposing any effort to legitimate homosexual practice rather than opposing specific elements of the legislation.¹⁰⁸

It would seem that the true reason for the MCC's opposition to the bill was not that it would conflict with Church teaching about sexual orientation and behavior, since those problems could theoretically be solved with careful wording. Instead it seems that the MCC was concerned that any cooperation with drafting such controversial legislation could be misinterpreted as the Church's condoning of homosexual behavior. At least in this one case, the distinction between orientation and behavior seems to have been totally ignored by the bishops in order to reinforce the Church's basic opposition to any form of homogenital acts.

In 1995, the MCC increased its opposition to two new bills that came before the Maryland Legislature that year by arguing that new laws were unnecessary, as homosexuals do not suffer economic deprivation, and because there was no convincing evidence of pervasive discrimination.¹⁰⁹ They also argued that the

¹⁰⁶ See Dowling Letter, *supra* note 90.

¹⁰⁷ See generally Martha S. Allen, *Catholic Bishops Show They Are Willing to Listen*, STAR TRIBUNE (Minneapolis, Minn.), Nov. 22, 1992, at 1A, available in LEXIS, News Library, Arcnws File (theorizing that American Catholic bishops are increasingly willing to engage in dialogue with protesting groups because the bishops want to respond to parishioners' concerns with compassion). Previously, the bishops feared such dialogue would be perceived as deviating from traditional Roman Catholic teaching. See *id.* When the bishops of the several dioceses provide a joint statement suggesting guidelines for each diocese, Americans view the statement as a united front dissenting from the Vatican, when it is merely an opportunity for bishops to share information and views. See *id.*

¹⁰⁸ See Dowling Letter, *supra* note 90.

¹⁰⁹ The two bills were defeated by a pair of 14-9 votes in the House Commerce and Government Matters Committee. See *Panel Kills Bills Favoring Gays*, WASH. TIMES, Feb. 16, 1996, at C8. One of the bills was introduced by the Human Rights Commission, the other by Delegate Sheila Hixon. Both bills would have protected homosexuals from discrimination. See *id.*

bills would be contrary to the Religious Freedom Restoration Act of 1993,¹¹⁰ and would only serve to validate a homosexual lifestyle.¹¹¹

In the Spring of 1997, twenty Catholic clergy and religious responded in a signed, point by point statement refuting the arguments expounded by Dowling and the MCC. Although the bills had already been defeated the previous year, one was due to come before the Legislature again in 1997. The signers wanted the lawmakers to hear another Catholic voice on the topic. Their statement was sent to the members of the State Legislature, which would hold hearings on a new bill, and also to the bishops of the MCC.¹¹²

Although the 1997 version of the bill was again defeated,¹¹³ the MCC did not oppose it in writing. Dowling did appear before the Committee to reiterate Catholic principles on marriage and family issues.¹¹⁴ It did appear, however, that the statement of the clergy and religious achieved its intended effect.¹¹⁵ It provided the lawmakers with counter-arguments to Dowling's reasoning for opposing the bill. The response also put the MCC on

¹¹⁰ Congress enacted the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb - 2000bb-4 (1993)). The Supreme Court invalidated the statute in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997). The Court held the statute exceeded Congress' power under the Fourteenth Amendment; was contrary to principles of separation of church and state, and separation of powers; and constituted an unacceptable intrusion into states' powers to regulate. *See id.*

¹¹¹ Testifying before the Commerce and Government Matters Committee, Church officials stated that the legislation would be tantamount to approving a lifestyle that does not benefit society. *See Frank Langfitt, Committee Urged to Pass Gay Rights Law; Advocates, Opponents Address State Officials*, BALTIMORE SUN, Feb. 9, 1996, at 1B.

¹¹² The MCC had lobbied against the 1997 version of the Anti-Discrimination Act, H.B. 431, 163d Leg. Reg. Sess. (Md. 1997), because its members feared that the bill would burden churches by requiring health benefits for domestic partners of church employees. *See Tom Pelton, Gay Rights Backers Protest at Cathedral*, BALTIMORE SUN, Mar. 29, 1997, at 20B.

¹¹³ *See id.* (stating the House Judiciary Committee defeated the bill by a vote of 11-10).

¹¹⁴ *See id.* (noting that Catholics have deeply held religious beliefs that unmarried people should not cohabit or have sex).

¹¹⁵ *See id.* The bill failed by one vote, the closest vote in its five-year history before the Committee; *see also Statement by Response to Good Friday Protests at Cathedral of Mary Our Queen by Homosexual Activists*, BALTIMORE ARCHDIOCESE NEWS RELEASES, Mar. 28, 1997 <http://www.archbalt.org/news_032897.html>. Opposition to the official Catholic position on the anti-discrimination bill caused the Baltimore Archdiocese to publicly defend its position and that of the MCC. *See id.*

notice that Maryland Catholics do not speak with one voice in applying general principles to particular pieces of legislation.

At a June 5, 1997 meeting of the MCC Board, Dowling told the group that the MCC was perceived as the principal barrier to the enactment of Maryland's gay rights bill. This, he said, has prompted leaders of the anti-discrimination campaign to feature Catholic clergy and laity in their advocacy efforts, and that a department of the MCC was considering how to best respond to the development.

CONCLUSION

It appears that Church authorities who take the position of the MCC are willing to risk violating Church teaching on human rights and the dignity of homosexual people, as well as jeopardizing the credibility of the Church's proclamations about respect and justice for gay and lesbian people, in order to protect the Church's proscriptions on homosexual conduct. This strategy is especially disturbing in view of the possibility that mutual collaborative efforts of Church officials and legislators could produce specific gay rights legislation that would not only address valid Church concerns but also promote the legitimate rights of homosexuals. In spite of its need in some instances to oppose individual pieces of gay rights legislation, such active cooperation in drafting common ground legislation would dramatically enhance the credibility of the Church's claim to foster respect for the civil rights of homosexual people.

Public support by the Church for homosexual rights, coupled with private opposition to affirmative legislation would, however, seriously compromise the teachings of the Church on individual justice and render such teaching ineffective. If Church officials remain unwilling to cooperate with lawmakers to resolve differences and conflicts between Catholic principles and legislative proposals, then public protestations of the Church's apparent loss of concern for the human dignity of homosexuals will be seen as hollow rhetoric. Such a stance is a simplistic overture and a wholly inadequate application of Catholic principles to a conflict that demands timely and responsible attention.¹¹⁶

¹¹⁶ For a clear analysis of gay civil rights as an issue of social morality in the Church rather than sexual morality, see RICHARD PEDDICCORD, *GAY AND LESBIAN RIGHTS: A QUESTION: SEXUAL ETHICS OR SOCIAL JUSTICE* (1996). Charles Curran has argued that the case for Catholic support of gay rights may be greatly strength-

Finally, the lack of honesty in this strategy is embarrassing at best and, at worst, serves only to confirm suspicions that the real motives of some Church leaders are not always evident in their public words and actions.

It is fortunate that this kind of strategy is neither widely employed nor generally accepted by most bishops. More and more of them are learning about the legal and social realities involved in gay rights struggles. Increasingly, Church leaders are hearing firsthand accounts of discrimination and hostility directed at gay and lesbian people, and are learning to apply the basic principles of Catholic social justice doctrine to their own political, cultural and social settings.¹¹⁷

It is hoped that there will be greater involvement by the Church in the arduous process of public discourse, clarifying and articulating Catholic principles about human sexuality, and the benefits that cooperation may bring to a pluralistic society. It is likely that through such discourse, bishops will ultimately succeed in bringing the best of the Church's long tradition of social justice, founded on the fundamental human dignity of every individual, to bear on the controversial and emotional issues of gay civil rights.

ened by incorporating Vatican II's theology of church-state relations developed by John Courtney Murray which distinguished between what is moral and what is legal. In this way, the Church could easily accommodate civil rights for homosexual citizens. Curran used the analogy of the Church's public response to the legal issue of divorce to argue for a similar public response to gay rights. He took a more cautious position, however, on the question of religious support for the legalization of "domestic partnerships or homosexual marriages." Charles E. Curran, *Laws, Public Policy and Gay and Lesbian Rights*, in *HISTORY AND CONTEMPORARY ISSUES: STUDIES IN MORAL THEOLOGY* 158-77 (1996).

¹¹⁷ See Allen, *supra* note 107, at 1A (stating that the American bishops were open to petitions from a variety of groups, including homosexuals and victims of childhood sexual abuse; the bishops responded to the concerns of Catholic women with a unified statement).